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SUPREME COURT, U.S.

No. 72-1621

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANK E. PELUSO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners are the parents and the administrator of the estate of a deceased serviceman. They instituted this suit under the Federal Tort Claims Act seeking damages resulting from the serviceman's death after surgery in an army hospital, alleging medical malpractice. The district court dismissed the suit on the authority of *Feres* v. *United States,* 340 U.S. 135 (Pet. App. A1). The court of appeals affirmed *per curiam* (Pet. App. A3-A4).

In *Feres,* this Court held that the government is not liable under the Federal Tort Claims Act for the death or injuries of members of the armed forces sustained incident to their service.[1] Like petitioner, two

[1]The Court rejected an interpretation of the Act which would permit tort claims arising out of non-combatant activities (340 U.S. at 138) and emphasized the special compensation system, which normally requires no litigation, provided by Congress for servicemen and their families (*id.* at 144), describing it as "not negligible or niggardly" (*id.* at 145.)

of the claimants involved in *Feres* sustained service-incident injuries allegedly resulting from medical malpractice of military doctors at military hospitals. Since the facts of this case are legally indistinguishable from those in *Feres*, the courts below correctly dismissed petitioners' claim.

There is no occasion for this Court to re-examine *Feres*. Petitioners, claim that *Feres* has been "eroded" and is no longer viable is incorrect and has been expressly rejected by the courts of appeals. See *Sheppard* v. *United States*, 369 F. 2d 272 (C.A. 3), certiorari denied, 386 U.S. 982[2]; *Dilworth* v. *United States*, 387 F. 2d 590 (C.A. 3); see also *Hall* v. *United States*, 451 F. 2d 353 (C.A. 1); *United States* v. *Lee*, 400 F. 2d 558 (C.A. 9), certiorari denied, 393 U.S. 1053.[3] Without exception, decisions of the courts of appeals—like the decisions below in the present case—continue to apply *Feres* in the medical malpractice area. See *e.g.*, *Henning* v. *United States*, 446 F. 2d 774 (C.A. 3), certiorari denied, 404 U.S. 1016;

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[2]The court of appeals stated in *Sheppard* (369 F. 2d at 272):

> The flat statement is made on behalf of appellants in their brief "* * * subsequent decisions of the Supreme Court destroyed the validity of [*Feres*]." Nothing could be further from the true fact.

[3]In *United States* v. *Lee*, *supra*, 400 F. 2d at 561, the Ninth Circuit observed that:

> Congress has not seen fit to amend the Tort Claims Act * * *, permitting the [*Feres*] decision to remain undisturbed for eighteen years. * * * This circuit in *Preferred Insurance Co.* v. *United States*, 222 F. 2d 942; cert. denied, 350 U.S. 837, * * * stated at page 945, concerning the *Feres* case:
>
> > The decision was unanimous and in the more than four years since it was rendered Congress has not amended the Tort Claims Act. Accordingly, the opinion must be accepted as dispelling any doubt as to the congressional intent in the adoption of the Act.

De Font v. *United States,* 453 F. 2d 1239 (C.A. 1), certiorari denied, 407 U.S. 910; *Buckingham* v. *United States,* 394 F. 2d 483 (C.A. 4); *Lowe* v. *United States,* 440 F. 2d 452 (C.A. 5), certiorari denied, 404 U.S. 833.

Furthermore, in *United States* v. *Brown,* 348 U.S. 110, the only decision of this Court since *Feres* involving a serviceman's right to sue under the Tort Claims Act, this Court stated (348 U.S. at 113):

> We adhere * * * to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty.

See also *Johansen* v. *United States,* 343 U.S. 427; *Patterson* v. *United States,* 359 U.S. 495; *United States* v. *Demko,* 385 U.S. 149.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.

DOJ-1973-07